duced"[3] (95 Cong. Rec. 14874-14875); and both the House and Senate reports expressly confirmed the Congressional intent that the amended language would continue to cover employees who, like those in the instant case, make, repair or install "machinery or tools" used in the production of goods for commerce, or who repair, maintain, improve or enlarge "equipment, or facilities of producers of goods," "whether they are employed by the producer of goods or by someone else who has undertaken the performance of particular tasks for the producer" (95 Cong. Rec. 14875, 14928-14929).

The other two decisions of this Court which petitioner asserts to be in conflict with the decision below are patently inapposite. *10 East 40th Street Bldg. Co.* v. *Callus*, 325 U.S. 578, dealt with maintenance employees who were not serving production facilities at all, but rather an office building in which office space was leased to a miscellany of tenants. In *Mitchell* v. *H. B. Zachry Co.*, 362 U.S. 310, 319, holding that employees engaged in constructing a new dam to augment a municipal water supply system were not covered by the Act, this Court explicitly pointed out that the employees were working on

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[3] The definition appears in Section 3(j), quoted in full at p. 20 of the Petition. Before the amendment, the pertinent portion read: "for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in * * * *any process or occupation necessary to the production thereof*, in any State." (Emphasis added.) The 1949 amendment changed the italicized words to read: "or in any closely related process or occupation directly essential to the production thereof * * *."

"neither a facility of 'commerce' nor a facility of 'production'."

2. *Exemption Issue.* Contrary to petitioner's contention (Pet. 10-13), the decision below is not only consistent with, but indeed is compelled by, this Court's decision in *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290. We acknowledge, however, that the interpretation of the industry-recognition clause which underlies the decision below appears to be in conflict with that adopted by the Fourth and Sixth Circuits in the *Modern Trashmoval* and *Steepleton* cases, supra, p. 7. In those cases, "recognized as retail" was construed to mean "labeled as retail," rather than "treated (functionally) as retail;" and the availability of the exemption was thus made to turn upon the way in which the word "retail" was defined in the glossary of terms used in the particular industry (see the government's petition for certiorari in *Steepleton*). Here, by contrast, the Ninth Circuit held that "testimony * * * to the effect that within the industry the defendant's business was and is considered to be retail" was "not an appropriate basis upon which to determine whether the retail exemption applies * * *." (App. C, p. 11). As we stated in our petition in the *Steepleton* case, the question of construction which divides these courts of appeals is of fundamental importance and warrants resolution by this Court. Accordingly, we do not oppose the granting of the writ limited to the exemption issue.

CONCLUSION

There is no occasion for further review on the coverage issue. However, in view of the importance of the exemption issue (see our petition in *Steepleton*, pp. 11-13) and the need for resolving the conflicting interpretations of the industry-recognition clause, we do not oppose the granting of the writ on the exemption issue.

Respectfully submitted.

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